No. 93-106

In The

Supreme Court of the United States

October Term, 1993

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, INC., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC., and MOGLE ENTERPRISES, INC. on behalf of themselves and all others similarly situated,

Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents, Indiana Department of Revenue and Kenneth L. Miller, Acting Commissioner of the Indiana Department of Revenue, restate the questions presented in the Petition for Writ of Certiorari as follows:

A. Whether the United States Supreme Court is bound by the Indiana Tax Court's construction of the Motor Carrier Fuel Tax.

B. Whether the Indiana Tax Court's construction of the Motor Carrier Fuel Tax violates Petitioners' rights to equal protection and due process of law under the United States Constitution.

C. Whether the United States Supreme Court should adopt a new, "sliding-scale" approach to its rational-basis scrutiny of state tax statutes.

LIST OF PARTIES

Respondents adopt Petitioners' list of parties with regard to petitioners, with the exception that no class has been certified as of this date. (Supplemental Appendix at 14). Respondents are not corporations.

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Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners improperly seek a writ of certiorari with respect to an unpublished final order of the Supreme Court of Indiana issued on April 14, 1993 (A. 1a). The Writ of Certiorari, if issued, should in fact be directed to the Indiana Tax Court with respect to the decision of the Indiana Tax Court reported at 605 N.E.2d 272 (1992)

(A. 2a), which decision was rendered a final judgment by the Indiana Tax Court pursuant to Indiana Trial Rule 56(C) on January 26, 1993. (Supplemental Appendix at 1).

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction pursuant to 28 USC § 1257(a) (1992). Petitioners essentially dispute the Indiana Tax Court's construction of the Indiana Motor Carrier Fuel Tax and the wisdom of the application of that tax to motor carriers traveling on the Indiana Toll Road. The United States Supreme Court lacks jurisdiction to address either of these issues.

Petitioners have improperly requested that the Writ of Certiorari be directed to the Surpeme Court of Indiana rather than to the Indiana Tax Court. The Writ of Certiorari, if issued, should be directed to the Indiana Tax Court, the highest court of the state that actually ruled on the merits. Additionally, Petitioners failed to include a copy of the final judgment sought to be reviewed in the Appendix of their Petition, and Petitioner's jurisdictional statement does not reference the date of entry of the judgment sought to be reviewed. Respondents have included a copy of that judgment in the Supplemental Appendix at 1.

Petitioners contend that the Petition draws into question the validity of a state statute on the ground that it is repugnant to the United States Constitution. Although this Court would have jurisdiction to address that question, the state statute in question is not repugnant to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The primary relevant statutory provisions are Ind. Code §§ 6-6-4.1-4(a) and 6-6-4.1-4.5(a) (1992).

Respondents acknowledge that the Petition for Writ of Certiorari argues that the state statute in question is violative of Section 1 of the Fourteenth Amendment to the United States Constitution. While Respondents deny that the state statute in question is in any way repugnant to the United States Constitution, Respondents agree that the subject matter of the Writ involves Section 1 of the Fourteenth Amendment to the United States Constitution.

In addition to the remaining statutory provisions and regulations set forth in Petitioners' Appendix, Ind. Code § 6-6-4.1-6 (1988) is also a relevant statutory provision. (Supplemental Appendix at 3).

STATEMENT OF THE CASE

Petitioners filed a two count Amended Verified Petition to Enjoin Collection of Tax and Original Tax Appeal ("Amended Verified Petition") with the Indiana Tax Court on July 22, 1991. Count I requested declaratory and injunctive relief, and Count II requested a refund of taxes already paid.

Petitioners filed a Motion for Summary Judgment on Count I of the Amended Verified Petition, raising the following issues:

I. Whether the Indiana toll road is a "highway" as defined under I.C. 6-6-4.1-1(f) for purposes of the Motor Carrier Fuel Tax?

II. Whether imposition of the Motor Carrier Fuel Tax upon fuel consumed in operating on the Indiana toll road is constitutional?

(A. 4a)

Respondents filed a Cross-Motion for Summary Judgment on these same issues. Following full briefing and oral argument, the Tax Court denied Petitioners' Motion and granted Respondents' Cross-Motion for Summary Judgment on both issues by its published opinion dated December 29, 1992. This Partial Summary Judgment Order was rendered final pursuant to Indiana Trial Rule 56(C) on January 26, 1993.

The Indiana Tax Court was not the first Indiana court of appellate jurisdiction to consider the issues raised by Petitioners' Amended Verified Petition. One of the Petitioners, Area Interstate Trucking, Inc., had previously filed a Motion to Intervene in a class action lawsuit in the Johnson County, Indiana Circuit Court. The Motion to Intervene raised these same issues, albeit in a different procedural context. The Trial Court denied Area's Motion to Intervene. The Indiana Court of Appeals affirmed the Trial Court's decision in *Area Interstate Trucking, Inc. v. Indiana State Dep't of Revenue*, 574 N.E.2d 311 (Ind. App. 1991), *transfer denied*, and the Indiana Supreme Court denied transfer on October 8, 1991.

Petitioners operate "commercial motor vehicles" subject to the Motor Carrier Fuel Tax, Ind. Code § 6-6-4.1-1 (1992). Petitioners are subject to this tax because they operate vehicles upon Indiana highways. Petitioners are

required to calculate the amount of taxable fuel based on the mileage their vehicles operate on Indiana highways, including the Indiana toll road. Petitioners are required to include toll road mileage in their calculation because the Indiana Toll Road is a highway, as defined by the Motor Carrier Fuel Tax statute. Both the Indiana Court of Appeals and the Indiana Tax Court have now so held.

The Motor Carrier Fuel Tax is not imposed upon fuel consumed in operations exclusively upon private property or upon the portion of fuel used to operate auxiliary equipment mounted on motor vehicles subject to the tax, because such fuel consumption is not for purposes of operating or propelling commercial motor vehicles on highways in Indiana.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners have failed to identify a valid basis for granting the Writ. Their Petition invites this Court to interpret state legislation contrary to a state appellate court's interpretation, to apply general rules of law to inapplicable factual situations, and to alter the firmly established standard for review of equal protection challenges to state tax statutes. None of these requests provide a valid basis for review by this Court. The Indiana Tax Court's well-reasoned and well-articulated decision does not necessitate this Court's reiteration of firmly established precedent of this Court.

1. The Indiana Tax Court's construction of the Indiana Motor Carrier Fuel Tax is binding upon the United States Supreme Court.

The Petition for Writ of Certiorari presented in this case does not involve a conflict between a state appellate court decision (i.e. the decision of the Indiana Tax Court)[1] and the United States Supreme Court decision of *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) as alleged by Petitioners. Rather, the Petition involves disgruntled taxpayers who insist that the Indiana Motor Carrier Fuel Tax should be given an interpretation which is more favorable to them. Because it is not the function of this Court to construe that state statute, the Petition for Writ of Certiorari should be denied.

The Indiana Motor Carrier Fuel Tax is imposed "on the consumption of motor fuel by a carrier in its operations on highways in Indiana." Ind. Code § 6-6-4.1-4(a) (1992); Ind. Code § 6-6-4.1-4.5(a) (1992). As previously determined by both the Indiana Court of Appeals and the Indiana Tax Court, the plain and ordinary meaning of highway includes a toll road. *Area Interstate Trucking, Inc. v. Indiana State Dep't of Revenue*, 574 N.E.2d 311 (Ind. App. 1991), *transfer denied; Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d 272, 277 (Ind. Tax Ct. 1992), *review denied*. Petitioners agree that they are subject to this tax as motor carriers providing for-hire transportation services through the operation of their trucks and

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[1] The Indiana Tax Court is considered a court of appellate jurisdiction. Decisions of the Indiana Tax Court may be appealed to the Indiana Supreme Court. Ind. Code § 33-3-5-15 (1988).

tractor-trailer vehicles on Indiana highways. Petitioners, however, argue that the "plain" and "clear" objective of this legislation is to assess a tax in direct proportion to the "consumption" of roads in Indiana, and that the purpose of the tax is to collect from taxpayers their proportionate share of the cost of maintaining the roads upon which they travel.

Petitioners' view of the legislative intent behind the Indiana Motor Carrier Fuel Tax deserves no consideration by this Court because it is directly contradicted by the Indiana Tax Court's decision. The Indiana Tax Court specifically held that "the motor carrier fuel tax is apportioned on the basis of the benefit of the use of Indiana's public roads, regardless of whether the roads are supported by the tax." *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d at 277. The purpose of this tax, as determined by the Indiana Tax Court, is simply to charge motor carriers for the use of the public roads in Indiana. *Id.* This Court must accept the Indiana Tax Court's interpretation of this Indiana legislation.

There is no doubt that the United States Supreme Court is bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2198 (1993). The United States Supreme Court lacks "jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971). Likewise, "legislative intent is a matter of state law, on which the highest court of a state speaks with finality." *Minotti v. Lensink*, 798 F.2d 607, 610 (2nd Cir. 1986), *cert. denied*, 482 U.S. 906 (1987) (citation omitted). This Court is not at liberty to depart from a state appellate court's

resolution of issues of state law. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 629 (1988).

This rule applies with equal force to the decision of the Indiana Tax Court, an intermediate appellate state court.

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise . . . . This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court.

Feiock, 485 U.S. at 630 n.3 (citations omitted). The Indiana Tax Court's interpretation of the Motor Carrier Fuel Tax, which the Indiana Supreme Court refused to review, is binding upon this Court.

2. The Indiana Tax Court's construction of the Indiana Motor Carrier Fuel Tax does not violate Petitioners' rights to equal protection and due process of law under the United States Constitution.

This Court's required adherence to the Indiana Tax Court's determination of the legislative intent behind the Motor Carrier Fuel Tax essentially disposes of this Petition for Writ of Certiorari. As Petitioners concede, the State of Indiana was not compelled by any constitutional requirement to tax fuel consumption in direct relation to

the benefits taxpayers enjoy. (Petitioners' Brief, pp. 9-10). As finally determined by the Indiana Tax Court, the State of Indiana chose to tax the use of all highways in Indiana, regardless of whether the highway was directly supported by the tax. *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d at 277. Thus, no equal protection violation is presented to this Court, and there is no conflict with *Carmichael*.

Carmichael plainly sets forth, as the Indiana Tax Court recognized, the general rule that a taxpayer cannot resist the payment of a tax merely because it is not expended for purposes which are peculiarly beneficial to it. As this Court explained:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children.

Carmichael, 301 U.S. at 522-23 (citation omitted). This firmly established rule has led the Court to reject arguments such as the one advanced by Petitioners.

> This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.

Id. at 523.

The principles set forth in *Carmichael* similarly require repudiation of Petitioners' suggestion that the Indiana Motor Carrier Fuel Tax is unconstitutional as applied to them because the State does not use revenues generated by that tax for the benefit of the Indiana Toll Road and its patrons. The tax charges motor carriers for the use of the public roads in Indiana. *Area Interstate Trucking*, 605 N.E.2d at 277. "[C]ommon carriers for hire, which make the highways their place of business, may properly be charged extra compensation for such use." *Id.* at 278 (quoting J. Hartman, *Federal Limitations on State and Local Taxation* § 12:3 at 670 (1981) (footnotes omitted)). Petitioners make the Indiana highways, including the Indiana Toll Road, their place of business and may properly be charged extra compensation for such use. The Indiana Tax Court's decision is consistent with the holding of *Carmichael*.

Petitioners assert that this case falls within an exception to the general rule, citing a footnote in *Carmichael*. The footnote cited, however, addresses a factual situation which is not present here. This case does not involve a tax assessed upon real property owners in a local governmental district based on the value of benefits accruing to

those property owners from a specific improvement project.[2] The benefits derived from the tax need not be, and in this instance are not, apportioned to the burdens of the taxpayer. "[T]he state is not required to use the revenues generated by the motor carrier fuel tax from operations on the Indiana toll road for the benefit of the Indiana toll road and its patrons." *Area Interstate Trucking*, 605 N.E.2d at 277.

The State of Indiana's decision to tax toll road usage does not violate Petitioners' equal protection or due process rights. As Petitioners concede, they are subject to the Indiana Motor Carrier Fuel Tax because they are motor carriers providing for-hire transportation services and their vehicles consume fuel in operations upon Indiana highways, which include the Indiana Toll Road. (Petitioners' Brief, p. 4). "In light of the legislative purpose to ensure that motor carriers pay for their use of the state's roads, the distinctions between Indiana toll road users" and the exempt users "are plain enough." *Area Interstate Trucking*, 605 N.E.2d at 277. Consumers of fuel used for vehicles operated exclusively on private property, for

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[2] Petitioners fail to discuss, or even to cite, the cases in that footnote addressing this different question. Neither *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165 (1935) nor *Road Improvement Dist. No. 1 v. Missouri Pac. R. Co.*, 274 U.S. 188 (1927) involve a factual situation which is even remotely similar to the one presented in this case. In each of those cases, the statute or ordinance which directed an assessment for the cost of improvements required that the assessment be measured by the benefit each local taxpayer received from the improvement project. In each case, the assessment levied was ruled improper either because there was no benefit to the taxpayer, or the assessment was not properly made in proportion to the benefit received.

vehicles operated out-of-state, and for auxiliary equipment, unlike toll road users, are not providing for-hire transportation services in operations upon Indiana public roads.

Petitioners present a similarly meritless assertion that their equal protection rights are violated based upon what they consider to be the "real impact" of the tax. Petitioners claim that they are the only taxpayers required to pay tax for vehicular use of public roads not supported by the tax collected. They claim, but fail to establish, that there is no conceivable basis to support the tax of toll road usage. *See F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2102 (1993). One conceivable basis for taxing toll road usage is to compensate Indiana for the indirect burdens imposed by the toll road. As noted by the Supreme Court of New Jersey:

> [T]he State incurs many expenses in connection with the use of the Turnpike and Parkway. Subsidiary roads are high-cost roads to the State because of the traffic congestion thereon resulting from Turnpike and Parkway traffic. And the State incurs other expenses in the administration of its road laws in connection with toll road use.

Safeway Trails, Inc. v. Furman, 41 N.J. 467, 197 A.2d 366, 376 (1964), *appeal dismissed, cert. denied*, 379 U.S. 14 (1964). The indirect benefits afforded to the toll road users are more than sufficient to meet the minimal requirements of the rational-basis test.

Further, Petitioners' assertion that they are the only taxpayers required to pay tax for vehicular use of public

roads not supported by the tax collected is a misstatement of fact. Even if every other road in Indiana were eligible to receive funds from the Motor Carrier Fuel Tax, Petitioners have not established that every alley, street and county road in Indiana does in fact receive such funds. The Legislature's determination that the Toll Road does not need funds from the Motor Carrier Fuel Tax is no different than a local official determining that an alley does not need funds in any particular year. The real impact of the tax is the same: funds are used by the State of Indiana where they are needed most. This discretion is precisely the reason for the deferential standard for review afforded to equal protection challenges to tax statutes.

Petitioners' real complaint with the Motor Carrier Fuel Tax deals with their perception of the wisdom and equity of that tax. *See Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d at 278.

> Time and again, however, this Court has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Nordlinger v. Hahn, 112 S.Ct. 2326, 2335-36 (1992) (citation omitted). This Court need not grant a Writ of Certiorari in this case simply to remind Petitioners that it is not the function of this Court to comment on the wisdom of legislative decisions. *See Beach Communications*, 113 S.Ct. at 2101.

3. The alleged complexity of the Indiana Motor Carrier Fuel Tax does not warrant modification of the firmly established rational-basis standard for review of equal protection challenges to state tax statutes.

Petitioners implicitly concede that no writ is warranted in this case by asserting that this Court should heighten the standard of review for equal protection challenges to state tax statutes. Petitioners suggest that this Court adopt a "sliding-scale"[3] approach to reviewing such challenges. This approach conflicts with the well-established approach followed by this Court.

> [T]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

Nordlinger, 112 S.Ct. at 2331. The Motor Carrier Fuel Tax does not jeopardize any fundamental right, such as freedom of speech, nor does it categorize on the basis of an inherently suspect characteristic, such as race or nationality. Petitioners have failed to establish any basis for a heightened standard of review in this case.

Petitioners suggest that the rational-basis standard for review should evolve with regard to modern-day tax

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[3] This approach is totally unworkable, because it leaves no definite standard to be applied and would require this Court to review virtually every equal protection challenge to new tax laws.

cases. More than 50 years ago, this Court commented on the wisdom of the rational-basis standard:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies.

Madden v. Kentucky, 309 U.S. 83, 87-88 (1940). Fifty years later, this Court still adheres to that philosophy. *Leathers v. Medlock*, 111 S.Ct. 1438, 1446 (1991), (quoting *Madden*, 309 U.S. at 87-88). The "standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger*, 112 S.Ct. at 2332. Because Petitioners' arguments regarding the standard for review of equal protection challenges have been soundly rejected by this Court, the Court should deny the Petition for Writ of Certiorari in this case.

CONCLUSION

The Motor Carrier Fuel Tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. Both the Indiana Court of Appeals and the Indiana Tax Court have held that the Indiana Toll Road is a highway within the meaning of the statute, and that holding is not challenged by the Petitioners herein.

The Indiana Tax Court has construed the purpose of the Motor Carrier Fuel Tax statute as simply to charge motor carriers for the use of the public roads in Indiana. This Court is bound by that construction, and Petitioners' efforts to advance a different interpretation, *i.e.*, that the purpose of the Motor Carrier Fuel Tax is to charge motor carriers only for their use of highways supported by the tax, is improper and cannot form the basis for the issuance of a Writ of Certiorari.

The Indiana Legislature has broad powers in the classification of taxpayers and the creation of taxes. The Motor Carrier Fuel Tax is apportioned on the basis of the use of Indiana's public roads, regardless of whether the roads are supported by the tax. The State of Indiana is not required to use the revenues generated by the Motor Carrier Fuel Tax from operations on the Indiana Toll Road for the benefit of the Indiana Toll Road and its patrons. The State of Indiana's decision to tax toll road usage does not violate Petitioners' equal protection or due process rights.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDICES

APPENDIX J

IN THE INDIANA TAX COURT

CASE NO. 49T10-9105-TA-00022

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, Inc., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC. and MOGLE ENTERPRISES, INC., on behalf of themselves and all others similarly situated,	FILED JAN 26 1993
Petitioners,	
vs.	
INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,	
Respondents.	

FINAL JUDGMENT ENTRY PURSUANT TO IND. TRIAL RULE 56(C)

The Court, having issued an opinion in this case on December 29, 1992 and having denied Petitioners' Motions for Summary Judgment and granted Respondents' Cross-Motion for Summary Judgment, hereby finds that there are no genuine issues of material fact with respect to Count I of Petitioners' Amended Verified

Petition to Enjoin Collection of Tax and Original Tax Appeal ("Amended Petition") and that summary judgment should be entered thereon. Such summary judgment, being entered upon less than all of the claims in this case, is hereby rendered final pursuant to Ind. Trial Rule 56(C) based upon the Court's express findings herein that there is no just reason for delay and that Petitioners, if they so choose, should be permitted to file with the Indiana Supreme Court a Petition for Review of the Court's December 29, 1992 opinion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that final summary judgment is hereby entered in favor of Respondents on Count I of the Amended Petition this 26th day of January, 1993.

/s/ Thomas G. Fisher
Thomas G. Fisher, Judge
Indiana Tax Court

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APPENDIX K

6-6-4.1-6 Credits against tax

Sec. 6. (a) A carrier is entitled to a credit against the tax imposed under section 4 of this chapter if the carrier, or a lessor operating under the carrier's annual permit, has:

(1) paid the tax imposed under IC 6-6-1.1 or IC 6-6-2.1 on motor fuel purchased in Indiana;

(2) consumed the motor fuel outside Indiana; and

(3) paid a gasoline, special fuel, or road tax with respect to the fuel in one (1) or more other states or jurisdictions.

(b) The amount of credit for a quarter is equal to the tax paid under IC 6-6-1.1 and IC 6-6-2.1 on motor fuel that:

(1) was purchased in Indiana;

(2) was consumed outside Indiana; and

(3) with respect to which the carrier paid a gasoline, special fuel, or road tax to another state or jurisdiction.

(c) To qualify for the credit, the carrier shall submit any evidence required by the department of payment of the tax imposed under IC 6-6-1.1 or IC 6-6-2.1.

(d) A credit earned by a carrier in a particular quarter shall be applied against the carrier's tax liability under this chapter for that quarter before any credit carryover is applied against that liability under section 7

of this chapter. *As added by Acts 1982, P.L.59, SEC.1. Amended by P.L.77-1985, SEC.28.*

APPENDIX L

AREA INTERSTATE TRUCKING, INC.,
Appellant-Intervenor-Plaintiff,

v.

INDIANA STATE DEPARTMENT OF REVENUE,
Appellee-Defendant.

No. 41A01-9012-CV-506.

Court of Appeals of Indiana,
First District.

June 26, 1991.

Trucking company brought class action against Department of Revenue contending that Department improperly assessed motor carrier fuel tax to extent trucking company's dump trucks used fuel in common fuel reservoir to operate mechanism which raised and lowered beds of trucks, as well as to move them along highway. Carrier filed motion to intervene, alleging that some of its fuel was used to traverse toll roads instead of public highways. The Johnson Circuit Court, Jeffrey C. Eggers, J., denied motion, and carrier appealed. The Court of Appeals, Baker, J., held that: (1) toll roads were "highways" within meaning of motor carrier fuel tax statutes, and (2) carrier did not use its fuel for locomotion along highway and for "another commercial purpose," and thus did not come within definition of class.

Affirmed.

Carrier that used some of its motor fuel to traverse toll roads did not come within class of carriers operating equipment having common fuel reservoir for locomotion

along highway and for "another commercial purpose," in action for refund of motor carrier fuel tax attributable to other commercial purpose, given determination that toll road was "highway" within meaning of motor carrier fuel tax statutes. West's A.I.C. 6-6-4.1-1 et seq.

James H. Hanson, Lynne D. Lidke, Michael J. Tosick, Scopelitis, Garvin, Light & Hanson, Indianapolis, Tom G. Jones, Jones, Loveall & Johnson, Franklin, for appellant-intervenor-plaintiff.

Kevin Charles Murray, Locke Reynolds Boyd & Weisell, Indianapolis, for appellee-defendant.

BAKER, Judge.

Today we[1] are asked whether a toll road is a highway. We determine that it is. The question arises out of Area Interstate Trucking, Inc.'s (Area) appeal from the trial court's final judgment denying Area's motion to intervene in a class action against the Indiana State Department of Revenue (the Department) to recover improperly assessed motor carrier fuel taxes.

Because we conclude a toll road is a highway, we hold Area was not a class member under the class definition and affirm the trial court's denial of Area's motion to intervene in the class action.

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[1] This action is before this court, instead of before the Indiana Tax Court, because the action was commenced in the Marion Superior Court on June 27, 1986, whereas the Indiana Tax Court did not come into existence until July 1, 1986. *See* IND.CODE § 33-3-5-1.

FACTS

Schwerman Trucking Company (Schwerman) operates dump trucks which have a common fuel reservoir containing the fuel to propel the truck and operate a mechanism which raises and lowers the beds of the dump trucks. On June 27, 1986, Schwerman filed a class action against the Department contending that the Department had improperly assessed the motor carrier fuel tax pursuant to IND.CODE § 6-6-4.1-1 *et seq.* and that Schwerman and the class members were due tax refunds. The trial court approved a stipulation for class certification entered into by Schwerman and the Department which defined the class as follows:

> "That the class is composed of the following taxpayers: each person and/or entity who operates equipment which has a common fuel reservoir for locomotion along the highway and for another commercial purpose and who are subject to the taxes imposed by the Indiana Code, as amended I.C. 6-6-4.1-1, et seq."

Record at 34.

Area filed a motion for the court to recognize a subclass and appoint Area as its representative and a motion to intervene, arguing its claim was like Schwerman's in that some of the fuel used by Area, a carrier, was used to traverse toll roads instead of public highways. Area argued toll roads are not highways and, therefore, the portion of Area's fuel consumed on the toll roads was fuel consumed for another commercial purpose and, in accordance with IND.CODE § 6-6-4.1-1(d), is not subject to the motor carrier fuel tax.

The trial court denied Area's motion to intervene and entered final judgment on the order, after finding that the motion was untimely and raised a question of law and fact not common to Schwerman's dispute with the Department, and that Area's intervention would prejudice settlement between the original parties by causing substantial delay. Area then filed this appeal. Subsequently, Schwerman and the Department filed a settlement agreement with the court acknowledging the agreement would have no effect on Area's claims.

In its order denying Area's motion to intervene, the trial court did not conclude explicitly that Area was not a member of the Schwerman class but restated the definition of the Schwerman class, noted the definition of highway found in IND.CODE § 6-6-4.1-1(f), stated that IND.ADMIN.CODE tit. 45, r. 13-2-11 (1984) indicates a toll road is a highway for the purposes of IND.CODE § 6-6-4.1-1, and found, "Common Sense points to a conclusion that had the Legislature and the Department of State Revenue intended toll road usage to not be highway and to be 'another commercial purpose', specific language to this effect would have been used." Record at 264, Item 7. *See also* Record at 263, Items 3-5.

From the court's findings we may infer that it would find Area is not a class member if it were faced with the issue. Both parties ask us, for the sake of judicial economy, to decide whether Area is a class member. Area contends that its use of fuel upon the Indiana toll road is fuel consumption "for another commercial purpose", just as is Schwerman's auxiliary power equipment fuel usage for the dump bed mechanism. Area argues it is, therefore, a member of the class defined by Schwerman and the

Department. The Department contends a toll road is a highway and, therefore, the sole purpose of the equipment operated by Area is for locomotion along a highway and not for any other commercial purpose. Therefore, the Department concludes, Area was not a class member.

DISCUSSION AND DECISION

Both Area and the Department agree the key issue in this case is the meaning and scope of the class definition stipulated to by Schwerman and the Department.[2] Specifically, the question is whether Area's claim for refunds of taxes paid on fuel used for transportation on a toll road brings it within the definition of class membership. On appeal, Area concedes that if it is not a class member there is no question of whether Schwerman was representing Area adequately and Area is not entitled to intervene.

As the appellant, Area has the burden of demonstrating reversible error. The trial court's judgment is clothed with a presumption that it is correct. *Indiana Dept. of Revenue v. Waterfield Mortgage Co.* (1980), Ind.App., 400 N.E.2d 212, 214.

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[2] Area initially raised as additional issues on appeal the trial court's findings that Area's motion to intervene was untimely, concerned questions not common with the disputes between Schwerman and the Department, and would prejudice settlement of the class claims. In its reply brief, however, Area abandons those issues. We agree with the parties that an answer to the question regarding Area's class membership is dispositive. Therefore, we do not address the additional issues raised by Area.

Our goal in construing statutes and regulations is to seek out and give effect to the intent of our legislature. *Superior Construction Co. v. Carr* (1990), Ind., 564 N.E.2d 281, 284; *Hamilton County Dept. of Public Welfare v. Smith* (1991), Ind.App., 567 N.E.2d 165, 169. In attempting to determine legislative intent, we give considerable deference to an interpretation of a statute by an administrative agency charged with administering the statute. *Indiana State Prison and State Employees' Appeals Commission v. Van Ulzen* (1991), Ind.App., 567 N.E.2d 1164, 1167; *Dept. of Revenue v. United States Steel Corp.* (1981), Ind.App., 425 N.E.2d 659, 666. Furthermore, "a long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Baker v. Compton* (1965), 247 Ind. 39, 42, 211 N.E.2d 162, 164.

A carrier, meaning a "person who operates or causes to be operated a commercial motor vehicle on any highway in Indiana", IND.CODE § 6-6-4.1-1(a), is charged with paying the motor fuel tax quarterly to the Department, IND.CODE §§ 6-6-4.1-4(a); 6-6-4.1-1(e) which is charged, under IND.CODE § 6-6-4.1-5(a), with depositing revenue collected from the motor fuel tax into the state highway fund. Thus, the Department is charged with administering the motor carrier fuel tax and we will pay great deference to its interpretation of IND.CODE § 6-6-4.1-1 *et seq.*

By the authority provided it in IND.CODE § 6-8.1-3-3, the Department adopted the rules in IND.ADMIN.CODE tit. 45, r. 13-1-11 (1984) on July 13,

1984. Those rules provide: "(a) The term 'highway' shall mean the entire width between the boundary lines of every thoroughfare that is open in any part to the use of the public for purposes of vehicular travel. (b) For purposes of IC 6-6-4.1-1, a toll road is a highway." No legislative change has been made that would indicate the legislature placed a different interpretation on IND.CODE § 6-6-4.1-1 since July 13, 1984. We give substantial weight both to the Department's interpretation of its own regulations and to the legislature's acquiescence in the administrative interpretation.

Although the doctrine of "legislative acquiescence is a useful tool of statutory construction, it is not a sufficient independent basis for affirming a judgment." *Indiana Department of State Revenue v. Mercantile Mortgage Co.* (1980), Ind.App., 412 N.E.2d 1252, 1253. Therefore, we will independently construe the term "highway" as used in IND.CODE § 6-6-4.1-1 in accordance with the usual rules of statutory construction.

"Statutes which impose or levy taxes may not be extended beyond the clear import of the language of the statute. Such statutes are to be construed strictly against the state and in favor of the taxpayer." *Wechter v. Indiana Department of State Revenue* (1989), Ind.Tax, 544 N.E.2d 221, 224, *aff'd* (1990), Ind., 553 N.E.2d 844. Nevertheless, in interpreting a statute we give the words used their ordinary and common meaning rather than "overemphasizing a strict literal or selective reading of individual words." *Spaulding v. International Bakers Services, Inc.* (1990), Ind., 550 N.E.2d 307, 309. We presume the legislature intended the ordinary meaning of the statutory language to apply unless such a presumption

"would manifestly defeat the object of the provisions." *Dept. of Revenue v. United States Steel, supra,* 425 N.E.2d at 665. The plain and ordinary meaning of words is the "meaning given to the language by the community and ordinary reader." *Romain v. A. Howard Wholesale Co.* (1987), Ind.App., 506 N.E.2d 1124, 1126.

IND.CODE § 6-6-4.1-1(f) defines a "highway" as "[T]he entire width between the boundary lines of every publicly maintained way that is open in any part to the use of the public for purposes of vehicular travel." In common usage, a "highway" is "1a: a road or way on land or water that is open to public use as a matter of right whether or not a thoroughfare; a public road or way including the right-of-way . . . c: a main direct road (as between one town or city and another) . . . " *Webster's Third New International Dictionary (Unabridged)* 1069 (1967).

A "toll road" is "a road for the use of which a toll is collected". *Id.* at 2405. As our supreme court stated, "Roads and highways are generic terms, embracing all kinds of public ways, such as county and township roads, streets, alleys, township and plank roads, *turnpike* or gravel roads, . . . " *Strange v. Board* (1910), 173 Ind. 640, 652, 91 N.E. 242, 247 (emphasis added). A "turnpike road" is "a: a toll road; esp.: a toll expressway . . . c: a main road; a paved highway having a crowned surface". *Webster's Third New International Dictionary (Unabridged)* at 2469. As we stated in *Southern Indiana Gas v. Dept. of Highways* (1989), Ind.App., 533 N.E.2d 1289, *trans. denied,* "All roads laid out under legislative enactment are public highways belonging to the State." *Id.* at 1293.

In accordance with these definitions, we hold that the plain and ordinary meaning of a toll road or turnpike is

that it is a highway as that term is defined in IND.CODE § 6-6-4.1-1(f). We have no reason to think that such a meaning for toll road would manifestly defeat the legislature's objective for the motor carrier fuel tax provisions. We, therefore, reject Area's arguments that: (1) a toll road is not a highway because the motor carrier fuel tax revenues are deposited into a state highway fund which allegedly is not used to support the toll road, *see* IND.CODE §§ 6-6-4.1-5; I.C. § 8-2.1-23-1; I.C. § 8-14-1-2; I.C. § 8-14-1-3; I.C. 8-23-9-55, and (2) a toll road is not "open", as the term is used to define "highway" in I.C. § 6-6-4.1-1(f), because access is gained by payment of a toll and is hampered by restrictions.

We repeat that the definition of class membership is an "entity who operates equipment which has a common fuel reservoir for locomotion along the highway and for another commercial purpose". Record at 34. Thus, the class definition requires both that an entity be using its fuel for locomotion along the highway and for another commercial purpose. We have determined that a toll road is a highway. Therefore, toll road use does not constitute "another commercial purpose". Because Area was using its common fuel reservoir solely for locomotion along a highway, and not for another commercial purpose, Area was not a class member. Consequently, as Area concedes, it is not entitled to intervene in Schwerman's action. The trial court did not err in denying Area the right to intervene as a class member in Schwerman's action against the Department.

Affirmed.

RATLIFF, C.J., and BARTEAU, J., concur.

APPENDIX M

IN THE INDIANA TAX COURT

CASE NO. 49T10-9105-TA-00022

AREA INTERSTATE TRUCKING, INC., INDIANA MATERIAL TRANSFER, Inc., ADVANCE TRANSPORTATION COMPANY, BRYAN TRUCK LINE, INC., CHURCHILL TRUCK LINES, INC., FRANKS & SON, INC., GREAT AMERICAN LINES, INC., KAT, INC. and MOGLE ENTERPRISES, INC., on behalf of themselves and all others similarly situated,

Petitioners,

vs.

INDIANA DEPARTMENT OF REVENUE and KENNETH L. MILLER, as Acting Commissioner of the Indiana Department of Revenue,

Respondents.

ORDER

(Filed Dec. 29, 1992)

This matter is before the Court on the Withdrawal of Motion for Determination of Class and Praecipe for Hearing filed by Petitioners.

The Court, being first duly advised in the premises, now finds that permission to withdraw the Motion for

Determination of Class and Praecipe for Hearing should be granted.

IT IS THEREFORE ORDERED that Petitioners are granted permission to withdraw their Motion for Determination of Class and Praecipe for Hearing at this time, subject to a right to re-file the Motion for Determination of Class and Praecipe for Hearing at a later date.

Dated: December 29, 1992

/s/ Thomas G. Fisher
Thomas G. Fisher, Judge
Indiana Tax Court

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